# ABORIGINAL CONSULTATION GUIDELINES

A SASKATCHEWAN ENVIRONMENT AND RESOURCE MANAGEMENT PERSPECTIVE

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## Foreword

Although this paper attempts to describe the nature of consultation it should be understood that it does not represent the views of Aboriginal people. Precisely what the collective view Aboriginal people have on consultation at this time is not totally understood. The term "consultation" may be viewed in the Aboriginal community in a negative context, basically meaning adhering to a process and not taking their concerns seriously. The challenge for the department will be to enlist the help of Aboriginal people to develop consultation processes that are beneficial to both our needs. Through this paper it is hoped to instill in SERM staff the need to consider Aboriginal people and their concerns as part of SERM's day to day activities.

The analysis contained herein represents the views of SERM and should not be construed as rendering legal advice. If legal or other assistance is required, Saskatchewan Justice should be contacted

**PART I**

## Introduction

The purpose of this paper is to provide a guideline to assist SERM staff in understanding our obligations (both legal and moral) to consult with Aboriginal people when developing and implementing legislation or policies that affect Aboriginal people. This paper is an extension of SERM's *Aboriginal Affairs Policy Framework, A Tool for Decision Making* and *Public Involvement Policy Framework* and is intended as a more comprehensive examination of consultation when dealing with Aboriginal people.

### How Will These Guidelines Help Me?

In reading these guidelines you may be seeking specific answers to fundamental questions such as how to consult, what is considered meaningful consultation, when is consultation complete and who decides when consultation is done? The truth is there are no simple answers to those questions, but it is hoped that by reading these guidelines you will understand the complexities of consultation as it is presently understood and the role you can play in the process.

Consultation is not the responsibility of any one person or branch within SERM. So whether you are a conservation officer, park manager, land manager, fish and wildlife ecologist forester or policy analyst, etc., you may be called upon to develop a consultation process or do the consultation directly with Aboriginal people on a whole range of resources issues that may impact or infringe Treaty or Aboriginal rights or a way of life. The role of consultation will be to achieve certainty in the decisions being made, with the result of fewer disputes or challenges. There are other benefits of consultation, including building relationships and trust with Aboriginal people, gaining a better understanding of Aboriginal people and their culture, and sharing knowledge and ideas from both perspectives.

These guidelines should be considered a work in progress to reflect the changing nature of consultation and the evolution it will go through because of court decisions, partnerships and improved relationships with Aboriginal people. If you have any comments, concerns or questions you are encouraged to contact Public Involvement and Aboriginal Affairs in Regina at 787-9643

### What is Consultation?

Consultation is a process of two-way communication between SERM and a First Nation, Métis, Tribal Councils, Métis Locals and/or Federation of Saskatchewan Indian Nations or Métis Nation of Saskatchewan..

SERM consults with First Nations and Métis when:

1) conservation or safety issues warrant changes to regulations, legislation, policies, planning or programs which may infringe on Constitutional rights;
2) policies or plans may impact Aboriginal peoples' culture and relationship with the natural environment; and
3) Aboriginal peoples' involvement is required to develop sustainable environment and resource management policies, plans and programs.

**Principles of Consultation**

In order to uphold the honour of the Crown:

- Consultations must take place while options are still open, before decisions have been made;
- Consultations must be in good faith, with the intention of substantially addressing the concerns of Aboriginal people;
- Aboriginal people must be given enough time to consult and inform and/or secure the support of their communities
- Time and resources are always limited; therefore consultations must be carefully planned. SERM does not provide funding for Aboriginal participation in consultation;
- Everyone must have access of all relevant information; information must be clear and understandable by all parties;
- Questions or information requests that arise during consultations must always be pursued;
- There should be a willingness to adjust a consultation process to meet unforeseen needs;
- Everyone involved must understand the purpose of the consultation and have realistic expectations with respect to the outcome of the consultations;
- The results of consultations and how the information was used in SERM decisions and actions must be reported back to Aboriginal people; and
- When possible, SERM will seek interest-based, non-regulatory, negotiated solutions.

**Consultation Processes**

- Local conservation and safety issues and problems are first discussed with Aboriginal people to attempt to arrive at a local, co-operative solution;
- Provincial conservation and safety issues and problems are first discussed with the FSIN and MNS via the Bilateral Task Forces to attempt to arrive at a joint solution and, if necessary, a jointly-developed consultation process; and
- Provincial environment and resource management policies are developed in co-operation with the Federation of Saskatchewan Indian Nations (FSIN) and Métis Nation of Saskatchewan (MNS) through the SERM-FSIN and MNS Protocol Agreements and Resource Management Services Contracts, and the Bilateral Task Forces;

## Background

In 1990, the Supreme Court of Canada in the case *R. v. Sparrow* established for the first time a test for justifiable infringement of an Aboriginal right. In 1996, the Supreme Court in *R. v. Badger* extended the *Sparrow test* to Treaty rights as well. The test outlines how federal and provincial laws must be justified when they interfere with constitutionally protected Aboriginal or Treaty rights. In establishing the test the courts were saying, at the very least, that Aboriginal or Treaty rights cannot be regulated or restricted in the absence of some compelling reason, and even when the compelling reasons exist, the manner in which those reasons are achieved must be respectful of and sensitive to the constitutionally protected rights of Aboriginal people. To ensure that any law which contemplates infringing an Aboriginal right is developed in a manner that is respectful and sensitive to the rights of Aboriginal people, the Supreme Court of Canada has dictated that government must engage in meaningful consultations with Aboriginal people. The general guideline provided by the Supreme Court is that consultation must "be in good faith, with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands [or other rights] are at issue."

SERM has adapted to the directions handed down by the Supreme Court and has undertaken to improve relationships and dialogue with First Nations and Métis. Since the emergence of *Sparrow, 1990*, SERM has engaged in a number of consultations with Aboriginal people, the most notable being the recent consultation on spotlight hunting which resulted in a regulation that impacts on what was a Treaty right to use spotlights at night to hunt. As a result of consultations and other dialogue with Aboriginal people, a picture of how the consultation process works in Saskatchewan is slowly starting to evolve. Listed below are some of the key points that are emerging from consultations:

- Both First Nations and Métis are reluctant to engage in consultation because it is seen as process leading to the watering down or weakening of Treaty or Aboriginal rights. First Nations characterize the process as the slow "shaving away" of Treaty rights.
- For Aboriginal people, taking part in consultation may legitimize government's infringement of their rights.
- Aboriginal people have said that they believe "consultation" means "consent". This is not how the Supreme Court of Canada has defined consultation.
- Aboriginal people are concerned that <u>any</u> dialogue that takes place with them can be viewed by government as consultation.
- Silence from First Nations and Métis on any regulation or policy that infringes on their rights is often interpreted as acceptance. This is not the case.
- In order to consult on any substantial or compelling issue, consultation should be used to establish a consultation process. (consult on consulting)
- The goal of the consultation must be clear and meaningful (government must incorporate Aboriginal people's input into final decisions).

**Treaty Rights and Aboriginal Rights: What is the difference, if any?**

In this discussion paper, the terms Treaty and Aboriginal rights will be used extensively. In order to determine if consultation is required because of a possible infringement of a Treaty or Aboriginal right, and because the courts apply the same justification analysis to both kinds of rights, the distinction between these two terms should be understood.

Although they appear to be the same, the source of these rights is different. Treaty rights were negotiated and then written into Treaty documents. In Saskatchewan we are familiar with treaties because the land on which Saskatchewan lies is subject to six numbered Treaties. These Treaties were made with "Her Majesty the Queen of England in the Right of Canada" and not with Saskatchewan. The province may not alter or change the Treaties and must accept the Treaties that are applicable within its boundaries.

The conventionally held view is that the treaties replaced or subsumed Aboriginal rights, or that Treaty and Aboriginal rights are one and the same. However, they are not. The *Constitution Act, 1982*, section 35(1) states that: " The existing Aboriginal and Treaty rights of the Aboriginal people of Canada are hereby recognized and affirmed." In 1982, when existing Aboriginal rights were recognized, the nature of these rights was not very well understood and they were compared to an "empty box of rights". This box of Aboriginal rights is slowly being filled over time as court decisions, such as *Sparrow* (examined further in the paper), confirm rights as identified and successfully argued by Aboriginal people.

Aboriginal rights are those rights that arise from the distinct customs, practices and traditions that were integral to the distinctive culture of Aboriginal people prior to contact with Europeans. Obviously, this definition does not fit with respect to Métis and as yet the court has not given clear direction on what will constitute Métis Aboriginal rights. However, from recent cases in Saskatchewan some form of Métis Aboriginal rights are starting to emerge.

It must be understood that section 35(1) did not create Aboriginal rights, it merely affirmed and protected those that existed by giving them constitutional status. An Aboriginal right cannot be a product of section 35 or one created by the courts, it must be a right to have previously existed, and once identified is then protected by section 35. SERM may not be aware of a right or know that it exists. The Aboriginal group claiming the right has to prove it exists to the satisfaction of the courts through oral evidence of elders or historical records.

In Saskatchewan, the Court of Queen's Bench in *R. v. Morin and Daigneault, 1997* determined that a specific Aboriginal right to fish exists for the Métis of northwestern Saskatchewan. The Métis Aboriginal right stems from section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms the existing Aboriginal rights of the Aboriginal peoples of Canada. Section 35(1) is made applicable to Métis by section 35(2) which states the Aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.

The northwest Métis right differs somewhat from the Supreme Court definition of an Aboriginal right because Métis Aboriginal rights originated after contact with Europeans. This decision points out that the court may take a broad interpretation of Aboriginal rights particularly where hunting and fishing rights are concerned.

## Pre-*Sparrow:* Little or No Consultation with Aboriginal People

Before addressing the central issue of consultation, it is important to more fully understand the situation that existed in Saskatchewan prior to 1990 and the *Sparrow* decision.

The *Constitution Act, 1867*, Section 91(24), confers upon the federal government the power to make laws in relation to Indians and the lands reserved for Indians. In the numbered Treaties, which were ratified roughly between 1870 and 1906, a clause was included which recognized Indian rights to hunt, fish and trap throughout the land surrendered except for land taken up for settlement, subject to some regulation as may from time to time be made by the government of the country.

In 1930, the federal government transferred to the western provinces the responsibility for managing the natural resources of the province through the *Natural Resources Transfer Agreement (NRTA)*. Clause 12 of the Saskatchewan agreement provided for Indian hunting and fishing to ensure a continuance of a supply of game and fish for Indians for food. Clause 12 provides that Indians are subject to the game laws of the province except when they are hunting for food on unoccupied Crown land or other lands to which they have a right of access. Later court decisions clarified that even when Indians are hunting with the protection of Clause 12, they are still subject to provincial game laws which are required for safety or which have overriding conservation purposes.

While the intention of the NRTA was to ensure that the Treaty right to hunt and fish remained protected, the NRTA set into motion a conflict between Indians, who have a constitutionally protected right to hunt and fish, and the provincial government, which assumed the authority to regulate hunting and fishing, including hunting and fishing by Indians. First Nations of Saskatchewan are opposed to the NRTA because they believe it altered their Treaty right to hunt and fish by restricting where they could hunt (unoccupied Crown land only) and removed commercial hunting rights (food only) ; and they were not consulted on the Agreement. As the province exercised its legislative jurisdiction over hunting and fishing, some legislation directly impacted on Treaty rights, and First Nations defended their rights through the courts, particularly during the 1970s, 80s and 90s.

Through the judicial process, which was adversarial and often created animosity, the court determined that all provincial game laws applied to Indians who were not hunting within the protection of Clause 12. For those hunting within the protection of Clause 12, provincial laws applied concerning such things as safe hunting practices, the commercial use of fish and wildlife; and some hunting restrictions for conservation purposes such as the establishment of game preserves and wildlife refuges. For the most part, except for conservation and safety, the province has little authority in regulating how and when Indians are hunting and fishing for food.

For Treaty Indians, the courts confirmed that hunting and fishing rights were limited to subsistence only but expanded the areas where hunting and fishing for subsistence could be carried out. For instance, Treaty Indians have the right to hunt and fish in provincial parks year round if hunting is open to non-Aboriginal licenced hunters. The courts also ruled that Treaty Indians could use many different methods to hunt and fish that were otherwise restricted for non-Indian people, such as spotlights at night.

Because the province has limited authority in regulating Aboriginal hunting and fishing, the harvest of the resources by Aboriginal people remains largely unknown and not well understood. This lack of information creates a problem for resource managers who have to take into account the harvest of fish and wildlife by Aboriginal people in their management plans without knowing the extent of the harvest. As a result, when action is required to reduce or control harvest to maintain adequate fish or wildlife stocks, it is often accomplished by regulating non-Aboriginal licenced hunters or fishers through bag limit reductions and reducing hunting or fishing seasons. These types of actions are consistent with the *Sparrow* decision and priorities on allocation of fish and wildlife. This method of management has worked reasonably well, but with more people emerging with Aboriginal rights to hunt and fish, there are signs that the present management practices may not be sustainable, particularly in local situations.

Therefore, the future of managing the renewable resources in Saskatchewan will require the cooperation and assistance of Aboriginal people. The province cannot take unilateral action to manage the resources without the involvement of Aboriginal people, particularly where hunting and fishing rights are concerned. This then places the onus on SERM to engage Aboriginal people in "meaningful consultation" and interaction in a way that respects their rights. The term meaningful consultation will be explored more fully later in the paper.

## Post-*Sparrow:* The Need to Consult

The *Sparrow* test provides specific guidance on how the competing interests of constitutionally recognized Aboriginal or Treaty rights and other resource users may be reconciled. This must involve:

- taking the Aboriginal and Treaty rights seriously,
- maintaining the honour of the Crown, and

- ensuring Aboriginal priority over all other users within the context of the conservation regime where harvestable resources, such as fish and wildlife, are involved.

Note that the need to consult under these circumstances is not a moral obligation or the right thing to do; it is a legally mandated obligation.

If government action interferes with the exercise of an Aboriginal or Treaty right, then government must justify the interference. The first part of the test requires government to prove that there is no way to reach the objective without infringing on a right (a compelling reason), and the second part of the test requires:

(i) that the infringement is as little as is needed to reach the objective,
(ii) in the case of expropriation, that fair compensation has been provided, and
(iii) that the Aboriginal group in question is consulted with respect to the measures contemplated that will interfere with their rights.

For the purposes of this paper it will be assumed that there is a compelling reason or "justification" for interfering with an Aboriginal right, such as conservation or safety, and the focus will be on the second part of the test related to consultation. If the province does not have a justifiable reason to infringe on a Treaty or Aboriginal right then it can not interfere with those rights.

## When to Consult

The simple answer, and basic rule of thumb, is that consultation is required whenever the department contemplates any action, such as a policy, legislation or regulation that may infringe on a Treaty or Aboriginal right. The action would have to be justifiable and the reasons compelling. The requirement to consult would be considered part of SERM's legal obligation to Aboriginal people. In general, the easiest categories to evaluate regarding consultation are actions that may impact hunting or fishing rights. Hunting and fishing rights are enshrined in Treaties and receive constitutional protection and are rights of significant importance to Aboriginal people. Examples of this kind of consultation undertaken by SERM include the recent consultation on spotlight hunting, and consultations on road corridor game preserves in the Candle Lake and Meadow Lake areas. Examples of consultation related to fishing include consultations with various First Nations on stream closures during spawning runs such as the Puskwakau River, the Montreal River at Lac La Ronge and Van Patten's Creek in the Wadena area. It is interesting to note that some of the stream closures are regulated closures such as the Puskwakau River and Van Patten's Creek, where others such as the Montreal River are by agreement with the local Band and community. The agreement to close spawning waters was arrived at through consultation for the reason of conserving fish stocks.

The need to consult is less obvious in land use related issues, such as building cabins on Crown or park lands. An example was the *Sundown* decision, where the Supreme Court of Canada held that the building of cabins for hunting was a reasonable extension of the right to hunt, but the decision also said that the province could regulate cabins to ensure environmental protection (conservation), where cabins are incompatible with park use (parks closed to hunting) and lands taken up for settlement (private land). SERM would be required to consult on the development of those regulations. SERM has undertaken consultations regarding constructing traditional resource use cabins in Lac la Ronge Provincial Park with the Lac la Ronge Indian Band and other interested parties in the La Ronge area. The purpose of the consultation is to jointly develop a traditional resource use cabin policy that is acceptable to both the Band and SERM.

The department is involved in a host of activities involving the natural environment, cultural and recreation activities, or authorizing or restricting activities on Crown land and there is always the potential to affect Aboriginal people in ways that are not always obvious. An example is the recent decision of the British Columbia Court of Appeal in the *Halfway River First Nation vs. British Columbia* case. In this case, the Band was able to have a cutting permit quashed because the B.C. government failed to properly consult with the Band and to take into account the concerns of the Band on how the cutting would affect their hunting and fishing rights in the area. The First Nation argued that government cannot know how an Aboriginal or Treaty right is impacted unless consultation has first taken place. Other things to consider could include such things as issuing a cutting permit where the activity interferes with a religious or burial site. Whether or not such an activity would infringe on Aboriginal or Treaty rights from a legal perspective is hard to evaluate. But by the very nature of the impact on Aboriginal people, such an activity would fall within our moral obligation to consult with Aboriginal people. For example, SERM has undertaken consultations with First Nations on reparation of burial sites and identifying culturally sensitive sites in land use plans such as Porcupine-Pasquia Integrated Land Use Plan.

Although the courts have set out a legal mandate to consult, it is hoped that through the process of building relationships with Aboriginal people the aspirations and concerns of Aboriginal people are intrinsically woven into the fabric of our day-to-day activities. The question of whether or how to consult should not have to be asked because the department will have surpassed its legal obligation by addressing and implementing the needs of the Aboriginal people through processes such as co-management, partnership agreements and open dialogue However, there will continue to be instances/cases where management activities within SERM's mandate require consultation with Aboriginal people. Fish and wildlife management activities, forest activities such as Forest Management Agreements and operating plans, park planning, land use planning, mineral leases and changes to legislation are but a few examples.

## What Constitutes Meaningful Consultation

If consultation is required a number of questions should be considered:

- who needs to be consulted;
- how should the consultation be undertaken;
- what are we consulting on;
- when is the consultation complete;
- what is required to satisfy the courts;
- what do Aboriginal people consider meaningful consultation, how would they like to be consulted;
- are we willing to accept input, or are we just providing information (likely won't meet *Sparrow* justification);
- is special funding required to ensure participation; and
- languages and interpretation.

Those are all good questions to which there is no definitive answer or bench mark to which consultation can be measured. The Supreme Court has not laid out specific guidelines for consultation nor do they intend to, or should we expect them too. The courts have not prescribed a consultation process but have set minimal requirements and basic principles to guide the consultation process. If challenged, the court will decide on a case-by-case basis whether the consultation was meaningful and adequate, in regards to the right infringed and the seriousness of the infringement. The following are excerpts from Supreme Court decisions that offer some direction on consultation:

In *Sparrow*, the Supreme Court stated:

> "... and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries."

This statement indicates that consultation is required but government is under no obligation to seek the agreement of Aboriginal people.

In *Nikal*, the Supreme Court expanded on *Sparrow:*

> "... in the aspects of information and consultation the concept of reasonableness must come into play. For example, the need for the dissemination of information and a request for consultations cannot simply be denied. So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement."

In the above statement, the Court has said the "concept of reasonableness" forms an integral part of the *Sparrow* test. The government must make "every reasonable effort to inform and consult", but there is also an onus imposed on Aboriginal people to consult as well. When government has made all reasonable efforts to create a forum for consultation, and Aboriginal people refuse to take part, a court is unlikely to recognize that an unjustifiable infringement of an aboriginal right has occurred based on lack of consultation.

In *Delgamuukw*, the Supreme Court wrote:

> Of course, even in these cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands [rights] are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands [rights].

In this decision, Supreme Court of Canada has gone futher in defining consultation suggesting in some cases it could require the consent of Aboriginal people when the provinces enact regulations on hunting and fishing on Aboriginal lands. However, the Supreme Court's comments were made in the context of Aboriginal title as opposed to Aboriginal or Treaty rights and how this would play out in Saskatchewan is unknown because hunting and fishing rights for Treaty Indians stem from the NRTA.

It would appear from the various Supreme Court decisions that the nature and scope of the consultation will be highly dependent on the circumstances of each case. There are two perspectives on consultation to consider: 1) what the courts accept as meaningful consultation, and 2) what the Aboriginal people accept as meaningful. These two perspectives may vary greatly and our challenge is to achieve a balance - meet both perspectives if possible.

From a purely legal perspective, SERM's first obligation is to satisfy the courts' perspective on consultation. However, the danger in satisfying the court and not the Aboriginal people with respect to consultation is not gaining the support of the Aboriginal community in implementing the intended measure be it a regulation, disposition, licence, operating guideline or other resource programs. On the other hand, if the consultation process has the support of the Aboriginal community then the consultation would likely surpass the legal requirement and be accepted by the court.

## Conclusion

The courts have not prescribed a specific consultation process. SERM has undertaken a number of consultations that have resulted in infringement of Aboriginal hunting and fishing rights (road corridor game preserves, night hunting, fishing closures) none of which have been challenged in the courts to date. Whether or not these cases will withstand a challenge based on the consultation process will have to be determined. The courts have preferred to react to the facts brought before them in particular cases and then decide the case before them whether the government has met its obligation to consult. The precise content on the duty to consult will vary based upon the nature of the Aboriginal or Treaty right at issue, and the nature and severity of the potential infringement of the right.

Though the courts will not provide a prescriptive definition of consultation, they have identified some of the necessary elements of adequate consultation, and they have provided some basic principles against which to measure existing consultation processes in order to determine whether conformance with requirements of section 35 have been achieved. These principles and one practical consideration may assist SERM staff in their efforts to consult with Aboriginal peoples.

1. The fiduciary relationship between the Crown and Aboriginal peoples should be reflected in the consultation process. In other words, a consultation process, to be acceptable in context of justifying an infringement of Treaty or Aboriginal rights, must uphold the honour of the Crown and be genuinely aimed a protecting Aboriginal interests.

2. There must be a valid legislative objective. The role of consultation is not only to inform but to empower Aboriginal peoples and to protect their constitutional rights.

3. The consultation process should be guided by an underlying purpose to avoid infringing Aboriginal and Treaty rights when such infringements are not necessary in order to achieve a valid legislative objective. If a consultation process does not aim at minimizing the effects of government decisions on Aboriginal right holders, and if it does not gather enough information to ensure that government has minimized the potential effects, then it is inadequate.

Finally, practically speaking, a consultation process should achieve some certainty in that the decision will be less vulnerable to a constitutional challenge. With that in mind government should be diligent and willing to genuinely consider Aboriginal peoples concerns and desires. Where agreement can be achieved, certainty will be greatest.

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# PART II

## Appendix I

## Consultation Examples

Following are two examples of consultation undertaken in Saskatchewan which will help provide insight into the consultation process.

**Night Hunting: A Province-wide Issue**

Background:

The most recent and extensive consultation undertaken with the First Nations and Métis was on the unsafe practice of hunting at night with spotlights. The purpose of the consultation was to enact legislation to end unsafe night hunting. The right to hunt at night using spotlights was upheld by the Supreme Court of Canada (*R. v. Prince and Myron*) but new legislation would infringe on that right for the compelling reason of safety for all Saskatchewan residents.

Process:

The consultation process was arrived at through preliminary planning with the Federation of Saskatchewan Indian Nations and Metis Nation of Saskatchewan, and included: 10 meetings with First Nations at the Tribal Council level and one with independent bands; 5 meetings in Métis communities; letters to all First Nations inviting a response to the proposal from Bands who could or would not attend meetings; letters to First Nations and Metis groups in Manitoba, Alberta and Northwest Territories; and an advertisement in daily and weekly newspapers inviting response from the general public, urban Aboriginal people, and those who could or would not attend meetings.

Results:

From the consultations SERM learned there was full support from elders for a ban on the use of spotlights for the purpose of killing animals. Comments on the use of spotlights included statements from elders that the practice was disrespectful to the animal being hunted, it was considered unsafe, and too many animals were being shot in some areas, raising the concern for conservation. There was also total solidarity among Aboriginal people to not relinquish their Aboriginal right to hunt at night by traditional means and under conditions which pose no threat to public safety, such as hunting in moonlight along rivers and lakes in remote areas. Some statements by First Nations suggested that although they were opposed to the use of spotlights, the control and use of spotlights should be left up to the discretion of First Nations and not legislated by the province.

Aboriginal people expressed clearly to government that the recently completed joint consultation meetings were not viewed by them as "consultation" but were viewed as "information" meetings only. The FSIN executive members did not support the very restricted time line established by government to implement a regulatory solution to prohibit unsafe night hunting. However, during the joint consultation meetings, department staff were commended for attending the meetings and listening to what Aboriginal people had to say, rather than talking about the department's intentions. The messages SERM received from First Nations were used in drafting the regulations. They respected First Nation's desire not to include Indian reserves within the scope of the legislation. The regulations took into account the First Nations Treaty right to hunt at night, except along highways and roads for reasons of safety , and they also prohibited the use of spotlights, consistent with the position of First Nation elders.

Will these regulations satisfy the court's requirement for consultation? The answer to that question remains unknown until the law is challenged. In *R. v. Noel,* a case stemming from the Northwest Territories, regulations aimed at safety were struck down by the court ( NWT court) in its application to Indian people because insufficient consultation had taken place. Yet in British Columbia, the British Columbia Supreme Court in *R. v. Seward* said that safety was a compelling enough reason to forgo consultation. From the position of the Government of Saskatchewan the night hunting consultations were undertaken in good faith and the cost of the consultation (in excess of $100,000) was borne by the government. Certainly, government believes it met the objective laid down by *Sparrow.* The regulations to end unsafe night hunting were developed following the consultation meetings.

Did the process undertaken with Aboriginal people satisfy their perception of consultation? From comments of the First Nations, they did not view the process as "consultation" but merely as information meetings. The meetings were arranged by the FSIN and Band leaders did attend and express their opinions, but they also suggested that meaningful consultation required discussing the issue with each individual band and its members. The task of consulting with each individual band then becomes onerous on government and if each issue was to be dealt with in this manner the consultation process would become overly exhaustive. The concept of reasonableness must then come into play and from SERM's perspective the consultation on unsafe night hunting was reasonable. SERM has also continued to meet with the individual First Nations and Métis Locals to discuss implementation of the regulations and how to deal with offenders through the community using alternative justice measures. Whether the courts accept the consultation as reasonable remains unknown until the new regulations are challenged, and whether the Aboriginal community accepts the regulations as they are written also remains unknown.

At the FSIN Chiefs Assembly of February, 1998, the FSIN put forward a resolution prohibiting the use of spotlights by First Nations. This resolution was tabled and at present the First Nations have not accepted the regulation on the use of spotlights, nor have they outright rejected it. However, the Vice-chief of Lands and Resources continues to promote to First Nations that hunting at night with lights is wrong based on the elders' teachings.

**Puskwakau River and Associated Stream Closures: A Local Issue.**

Background:

The Puskwakau River was a popular location for angling during the walleye spawning run. In 1970, a portion of the Puskwakau River near the Hanson Lake Road was closed to angling to protect spawning fish. In the late 1980s, the Peter Ballantyne Cree Nation, commercial fishers and outfitters concerned over the fishing pressure on parts of the Puskwakau River not covered by the closure and other spawning runs in streams that flow into Deschambault Lake, requested futher closures.

Process:

The impact on the fishery concerned SERM and also the Peter Ballantyne Cree Nation who passed a Band Council Resolution (BCR) closing the Puskwakau River and other streams and bays to fishing. The BCR, although having no force in law off the reserve, was an expression of the community's wishes to have the various streams closed to fishing. Following consultations with the Band, commercial fishers and outfitters, a study was undertaken to determine the impact of fishing during the spawning runs. From the study it was confirmed that the spawning runs had to be protected as a conservation measure to protect fish stocks.

Results:

Regulations were passed under the *Fisheries Act* to close all the streams and bays requested by the community. Eventually charges were laid against a community member who challenged the closures on the grounds his Treaty rights were violated. The person was convicted because the community supported the closures in order to protect fish stocks.

## Appendix II

## CONSULTATION GUIDELINE SYNOPSIS

### INTENT

To outline the principles of consulting with Aboriginal people when SERM's regulations, legislation, policy or programs may: 1) infringe on their constitutional rights; 2) impact Aboriginal peoples' culture and relationship with the natural environment; or 3) when their input is required to assist in developing environment and resource management programs and policies.

### CONSIDERATIONS

- The Supreme Court of Canada in the 1990 decision of *R. vs. Sparrow* established for the first time a test for justifiable infringement of an Aboriginal or Treaty right. The test outlines how federal and provincial laws must be justified when they interfere with constitutionally protected Aboriginal and Treaty rights.
- The intent of the Supreme Court decision in *Sparrow* and other cases was to ensure that Aboriginal and Treaty rights cannot be regulated or restricted in the absence of some compelling reason, and even if compelling reasons exist, the government must engage in meaningful consultation with Aboriginal people that is sensitive and respectful.
- SERM has provided general policy direction on consultation in the *Aboriginal Policy Framework* and the *Public Involvement Policy Framework*.

### GUIDELINES

- There are no prescriptive guidelines for consultation and SERM staff must develop an appropriate process in keeping with the intent of consultation. Depending on the issue, consultation can range from simply informing to outright consensus of Aboriginal people. Their level of involvement in the "product" can range from minimal to a process of full co-operative development.
- Consultation can take place at the district or regional level with First Nations who use the area, the local Bands and Tribal Councils, or Métis Locals. Provincial level issues will involve consultations with the Federation of Saskatchewan Indian Nations (FSIN) or the Métis Nation of Saskatchewan (MNS).
- A consultation plan should always be developed and shared with the appropriate staff before beginning any consultation. This allows everyone to be informed of the measures proposed and the process involved. For assistance in developing a consultation plan see the guidelines for consultation in SERM's *A Guide to Policy Development* or discuss consultation needs with Public Involvement and Aboriginal Affairs (PIAA). Depending upon the issue and scope of the consultation, a Cabinet Decision Item (CDI) may be required, in which case PIAA needs to be involved.

Although, there are no legally prescribed steps when and how to consult with Aboriginal people, the Supreme Court, through several rulings, has provided some insight into the manner and intent of the consultation.

- provincial laws which infringe upon Aboriginal or Treaty hunting and fishing rights must meet the conditions laid down by the Supreme Court in *R vs. Sparrow*, 1990.
- To determine if proposed regulations or legislation may infringe on an Aboriginal right the following consideration have to be taken into account:
  - first, is the proposed regulation or limitation unreasonable
  - second, does the regulation impose undue hardship
  - third, does the regulation deny to the holders the right of their preferred means of exercising that right.

**How:**

- If an infringement of a right is anticipated or cannot be avoided, the *Sparrow* justification test must be satisfied:
  - there must be a valid legislative objective, such as conservation or safety, and the objective must be "compelling and substantial"
  - the honour of the Crown must be upheld and aboriginal rights must receive the highest priority
  - the infringement must be as little or narrow as needed, and
  - the aboriginal people affected must be consulted.
- The infringement will be justified only if the government has done all it can to avoid the infringement
- The goal of consultation will be:
  - to achieve some certainty that the outcome will be less vulnerable to a constitutional challenge
  - to protect aboriginal rights, not justification of their infringement
  - to substantially address the concerns of Aboriginal peoples whose lands or other rights are at issue
- What if Aboriginal people refuse to consult:
  - if the concerns of the Crown are valid and there is a substantive and compelling reason to implement regulations, Aboriginal people cannot refuse to consult as a means to stop the intended measure
  - SERM will continue to try and consult and inform the leadership of its intention through direct contact and correspondence
  - all efforts to consult will be recorded
  - if challenged on enacted legislation, SERM will defend its actions in court

## Who:

- SERM has an obligation to inform Aboriginal people:
  - about the proposed measures and their potential impacts on Aboriginal or Treaty rights
  - about the steps taken at arriving at a decision and reasons for interfering with rights
- SERM staff have an obligation to become informed:
  - about aboriginal rights and uses of an area or resource
  - about the potential impacts of the proposed decisions or projects on those rights and uses
  - about the views of aboriginal people concerning the intended measures or alternative methods of achieving government's objectives

## Where:

- SERM is involved in partnership agreements with 10 Aboriginal groups which obligate us to involve them in department decision-making. Use these forums to introduce issues and problems and develop joint solutions where the impact on and interest of stakeholders is minimal. Generally the partnerships are being implemented at the EcoRegional level. To discuss having your regulation or policy on the agenda of a partnership meeting, contact the Eco-Regional Director or Integrated Resource Manager (IRM).
- Twenty-two SERM co-management boards include Aboriginal group representatives. These forums may be used to develop local, community-based solutions to a wide range of environment and resource management including planning, policy-making and program development and delivery. Contact the IRM to discuss including your item on the agenda of co-management boards.
- SERM has partnership agreements with the FSIN and MNS. Both of these may be used as forums for initial discussions on problem areas that may be likely to result in SERM policies or regulations that will impact on First Nations or Métis people provincially. Consultation around regulations or policies with the potential for provincial impact on Aboriginal people should first be discussed with PIAA to strategize the appropriate consultative approach.